

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES HARDWICK,	§
	§
Defendant Below-	§ Nos. 262/291, 2011
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr. ID 0709006233
Plaintiff Below-	§
Appellee.	§

Submitted: January 20, 2012

Decided: March 27, 2012

Before **STEELE**, Chief Justice, **HOLLAND**, and **RIDGELY**, Justices.

ORDER

This 27th day of March 2012, upon consideration of the parties' briefs and the record on appeal, it appears to the Court that:

(1) The appellant, James Hardwick, filed this appeal from the Superior Court's denial of his first motion for his postconviction relief.¹ We find no merit to the appeal. Accordingly, we affirm the Superior Court's judgment.

(2) The record in this case reflects that Hardwick was reindicted in March 2008 on thirty-six counts of first degree rape, two counts of attempted

¹ The Superior Court appointed counsel to represent Hardwick in pursuing his postconviction claims. Counsel filed a notice of appeal on Hardwick's behalf, but Hardwick chose to discharge his counsel and to represent himself on appeal.

second degree rape, and two counts of continuous sexual abuse of a child. The charges stemmed from allegations that Hardwick had sexually molested his underage stepdaughter Alice and her friend Peggy² over an extended period of time. The incidents were not reported to police until nearly two years after the fact when Peggy went to police in 2007 with the information. At that time, the police obtained the consent of Peggy's parents and recorded several phone calls between Hardwick and Peggy during which Hardwick made plans to meet Peggy, who was then 15, and a fictitious underage friend for a future sexual encounter. The tapes of these phone calls were admitted into evidence at Hardwick's trial. Both Alice and Peggy also testified against Hardwick. The jury convicted Hardwick in June 2008 of twenty-nine counts of first degree rape and two counts of attempted second degree rape. The Superior Court sentenced Hardwick to thirty-one life sentences.³ This Court affirmed Hardwick's convictions and sentences on direct appeal.⁴ Hardwick filed a motion for postconviction relief in June 2009, which the Superior Court denied. This appeal followed.

(3) Hardwick enumerates eight claims in his opening brief on appeal. He argues that: (i) both a police witness and defense counsel

² These are pseudonyms that were used to identify the victims in this Court's opinion on Hardwick's direct appeal.

³ Hardwick's sentences were enhanced because of his prior criminal record.

⁴ *Hardwick v. State*, 971 A.2d 130 (Del. 2009).

violated his right to a fair trial by referring to Alice and Peggy as “victims;” (ii) the trial court erroneously instructed the jury; (iii) the prosecutor engaged in misconduct by misrepresenting facts to the jury; (iv) the trial court engaged in misconduct in handling his postconviction motion; (v) his trial counsel was ineffective for failing to call his nephew, Matthew Hardwick (“Matthew”), as a witness or else play a recording of Matthew’s interview with investigators in the case or present any other favorable witnesses; (vi) his confrontation clause rights were violated because he was charged with the attempted second degree rape of an “unknown victim;” (vii) his due process rights were violated when the trial court allowed the admission of recorded phone calls between Hardwick and Peggy; and (viii) his trial counsel and/or appellate counsel were ineffective for failing to raise any of the foregoing claims at trial or on appeal.⁵

(4) In reviewing the Superior Court’s denial of postconviction relief, this Court first must consider the procedural requirements of Rule 61 before it may consider the merits of any postconviction claims.⁶ Superior Court Rule 61(i)(3) provides that any ground for relief that was not asserted in the proceedings leading to the judgment of conviction is thereafter barred

⁵ To the extent that Hardwick presented other claims to the Superior Court, those claims are deemed waived for his failure to raise them in his opening brief on appeal. *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993).

⁶ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

unless the defendant can establish cause for relief from the procedural default and prejudice from a violation of his rights.⁷ To establish cause, Hardwick must show that an external impediment prevented him from raising the claim earlier.⁸ To establish prejudice, Hardwick must demonstrate actual prejudice resulting from the alleged error.⁹ Rule 61(i)(5) provides that a claim otherwise barred by Rule 61(i)(3) may be considered if the movant can establish that the Superior Court lacked jurisdiction or can establish a colorable claim of a miscarriage of justice due to a constitutional violation that undermined the integrity of the proceedings leading to the conviction.¹⁰

(5) Hardwick asserts his counsel's ineffectiveness as cause for his failure to raise any of these claims in the proceedings leading to his convictions. In order to establish a claim of ineffective assistance of counsel, a defendant must prove that: (a) counsel's representation fell below an objective standard of reasonableness; and (b) there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different.¹¹ There is a strong presumption that

⁷ Del. Super. Ct. Crim. R. 61(i)(3) (2012).

⁸ *Younger v. State*, 580 A.2d at 556.

⁹ *Id.* at 555-56.

¹⁰ Del. Super. Ct. Crim. R. 61(i)(5) (2012).

¹¹ *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

counsel's representation was professionally reasonable.¹² Any error short of ineffective assistance of counsel does not constitute "cause" for a procedural default.¹³

(6) In evaluating Hardwick's first claim on appeal, we note that this Court previously has held that the use of the term "victim" by attorneys or witnesses is not objectionable in all cases and under all circumstances.¹⁴ The record in Hardwick's case reflects that the trial took place over the course of five days. The record further reflects that use of the term "victim" was limited to two isolated instances, once by a police witness and once by defense counsel, after which each speaker immediately corrected himself.¹⁵ Given that consent was not a defense in Hardwick's case,¹⁶ nor was the evidence against Hardwick limited solely to the testimony of Alice and

¹² *Id.* at 689.

¹³ *Younger v. State*, 580 A.2d at 556.

¹⁴ *See Mason v. State*, 1997 WL 90780 (Del. Feb. 25, 1997) (holding that multiple references to the underage complainant as "the victim" by both lawyers and witnesses were not objectionable in a sexual assault case where consent could not be a defense to the crime). *Compare Fritzinger v. State*, 10 A.3d 603 (Del. 2010) (holding that the trial judge's use of the term "victims" to refer to the complaining witnesses was prejudicial because use of the term by the judge, as opposed to lawyers or witnesses, signaled to the jury that the judge believed the State's version of the facts).

¹⁵ The first reference was made by a police witness in describing the general purpose of a pretext phone call. He said, "A pretext phone call is an investigative technique that we use where we have the victim or—excuse me, in this case, the—[Peggy] conduct a phone call to the suspect in the incident..." The second use of the term "victim" was during defense counsel's closing argument. Defense counsel stated, "As I mentioned at the beginning of the case there is no physical or scientific evidence that was pursued by the police in this case or that the State has presented to you to support the victims—the complaining witnesses' story in this case."

¹⁶ *See Mason v. State*, 1997 WL 90780 (Del. Feb. 25, 1997).

Peggy,¹⁷ we conclude that Hardwick has not established cause or prejudice sufficient to overcome the procedural bar of Rule 61(i)(3).

(7) Hardwick's second argument on appeal is that his trial counsel erred in failing to object to the following jury instruction:

You are the sole judges of the credibility of each of the witnesses and the weight of the evidence. In weighing the testimony of any witness, you may consider the opportunity and ability of the witness to observe; the witness's memory and manner while testifying; any interest, bias, or prejudice the witness might have; whether the testimony is consistent with the witness's earlier statement, with other evidence, or with common experience or anything else bearing on believability.

You need not believe any witness, even though the testimony is uncontradicted. You may believe all, part, or none of the testimony of any witness. If you find the testimony of any of the witnesses to be conflicting, you should try to harmonize it. However, if you cannot do that it is your privilege, as the judges of the facts, to accept the part of the testimony that you conclude is more credible and to reject any part that you do not consider as credible.

Hardwick contends that this instruction constituted an impermissible comment on the evidence as "uncontradicted" and effectively mandated that the jury reach a guilty verdict. We find no logical basis for this assertion. The jury instruction was an accurate statement of the law and of the jurors' role as the trier of fact.¹⁸ In no way did the trial court's instruction suggest that the evidence against Hardwick was uncontradicted or that the jurors should believe or disbelieve any particular testimony. There was no basis

¹⁷ Compare *Fritzing v. State*, 10 A.3d at 610.

¹⁸ See *Archy v. State*, 2011 WL 4000994 (Del. Sept. 8, 2011).

for defense counsel to object to this instruction. Accordingly, Hardwick has failed to overcome the procedural hurdle of Rule 61(i)(3).

(8) Hardwick next asserts that the prosecutor engaged in misconduct by arguing facts in his closing argument that were not supported by the evidence and by failing to produce “favorable exculpatory testimonial evidence.” Neither of these arguments was presented in Hardwick’s postconviction motion. Accordingly, the Court will not consider these claims for the first time on appeal.¹⁹

(9) Hardwick’s fourth argument is that the Superior Court engaged in misconduct in the way it handled his postconviction motion. Again, Hardwick did not raise this complaint to the Superior Court in the first instance. To the extent Hardwick suggests that the trial court’s denial of his postconviction motion reflects judicial bias, we find no support for such a claim. A trial court’s rulings almost never constitute a valid basis to question a judge’s impartiality.²⁰ We find nothing in the Superior Court’s handling of Hardwick’s postconviction motion to reflect any level of “antagonism as to make fair judgment impossible.”²¹ Accordingly, we reject this claim.

¹⁹ Del. Supr. Ct. R. 8 (2012).

²⁰ *Liteky v. United States*, 510 U.S. 540, 555 (1994).

²¹ *Id.*

(10) Hardwick's fifth argument is that his trial counsel was ineffective for failing to subpoena Hardwick's teenage nephew, Matthew, to testify as a witness on Hardwick's behalf or to present other favorable witnesses. The record reflects that Peggy told police that Matthew had participated in some of the sexual assaults together with Hardwick. Alice disputed Matthew's involvement. When interviewed by police, Matthew denied participating in or knowing about Hardwick's assaults.²² Matthew informed defense counsel that he would appear voluntarily and testify on Hardwick's behalf at trial. Given his concerns over Matthew's possible self-incrimination, defense counsel requested that the trial court appoint counsel to represent Matthew. Defense counsel arranged transportation for Matthew to get to the courthouse. When the time came, however, defense counsel was informed by Hardwick's own mother that Matthew had left his house in Pennsylvania and that his family did not know his whereabouts. Defense counsel requested a missing witness instruction, which the Superior Court refused to give. This Court affirmed that ruling on direct appeal.²³

(11) In evaluating counsel's performance, a reviewing court must eliminate the distorting effects of hindsight and reconstruct the circumstances of counsel's challenged conduct in order to evaluate the

²² The police did not charge Matthew with any crime.

²³ *Hardwick v. State*, 971 A.2d at 134-35.

conduct from counsel's perspective at the time.²⁴ There is a strong presumption that counsel's performance fell within the wide range of reasonable professional assistance.²⁵ Moreover, even if the defendant can establish unreasonable error by counsel, the defendant also must show that error had an adverse impact on the outcome of his trial.²⁶

(12) In this case, we agree with the Superior Court's conclusion that Hardwick can establish neither unreasonable attorney error nor prejudice. The record reflects that defense counsel was concerned enough about Matthew's potential criminal involvement and how he would testify at Hardwick's trial that he arranged in advance to have separate counsel appointed to represent Matthew. Even assuming that Matthew would have agreed to testify rather than invoking his rights under the Fifth Amendment, Hardwick has failed to substantiate his claim that Matthew would have provided exculpatory testimony. Even if Matthew had been able to provide some testimony contradicting Peggy's testimony, we agree with the Superior Court that such testimony, given Matthew's self-interest and the other evidence against Hardwick, would *not* have changed the outcome of the trial. Similarly, to the extent that Hardwick suggests that trial counsel erred in failing to call other "favorable" witnesses for the defense, Hardwick has

²⁴ *Strickland v. Washington*, 466 U.S. at 689.

²⁵ *Id.*

²⁶ *Id.* at 692.

failed to substantiate what favorable testimony these witnesses could have provided and how it would have changed the outcome of his trial.²⁷

Accordingly, we reject this claim on appeal.

(13) Hardwick next argues that he was denied his constitutional right to confront witnesses against him because he was indicted for attempting to have sexual intercourse “with an unknown female” without her consent. Hardwick seems to suggest that it is unconstitutional for a defendant to be charged with a crime if there is not a live victim who will testify at trial about the alleged crime. Hardwick’s argument has no merit. Hardwick was charged with attempted rape based on the evidence contained in his recorded phone calls with Peggy during which he made arrangements to meet Peggy and, he believed, her fifteen-year-old friend for sex. Hardwick was forty-nine years old at the time. It is irrelevant that the fifteen-year-old friend was fictitious. Under the circumstances as he believed them to be, Hardwick showed up at the prearranged meeting place at the agreed-to time with a condom in his pocket. He thus took a substantial step toward completing the

²⁷ In his affidavit, trial counsel indicated that, besides Matthew, Hardwick had identified only one other potential alibi witness. The witness was then interviewed and denied that she could establish any alibi for Hardwick on the dates in question. Counsel therefore did not call her to testify at trial.

crime of second degree rape.²⁸ The charge of attempted second degree rape was proven beyond a reasonable doubt.

(14) Hardwick next asserts that this trial counsel was ineffective for failing to file a motion to suppress his recorded telephone calls with Peggy. According to Hardwick, the admission of his unsworn statements violated his right to privacy and his right against self-incrimination. Hardwick also suggests that the recorded conversations were the result of illegal wiretapping. There is no merit to Hardwick's contentions. As the Superior Court noted, counsel had no basis to file a motion to suppress because, in accordance with 11 Del. C. § 2402(c)(4), Peggy's parents had given their prior consent to the police recording their daughter's phone calls with Hardwick. Moreover, the Fifth Amendment does not offer protection to a defendant who voluntarily incriminates himself, as Hardwick did in this case.²⁹ Accordingly, we find nothing to support Hardwick's claim of ineffective assistance of counsel.

(15) Finally, to the extent that Hardwick alleges error on the part of his appellate counsel for having failed to raise any of the foregoing claims on appeal, we find no merit to Hardwick's contention. This Court will not

²⁸ See DEL. CODE ANN. tit. 11, § 531(2) (2007), which provides that a person is guilty of an attempt to commit a crime if the person "[i]ntentionally does or omits to do anything which, under the circumstances as the person believes them to be, is a substantial step in a course of conduct planned to culminate in the commission of the crime by the person."

²⁹ *United States v. Heilman*, 377 F.App'x 157, 207-08 (3d Cir. 2010).

consider a claim of ineffective assistance of trial counsel on direct appeal.³⁰

Accordingly, we find no error in appellate counsel's failure to raise these claims of trial counsel's ineffectiveness on direct appeal.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice

³⁰ *Wing v. State*, 690 A.2d 921, 923 (Del. 1996).